

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

FRANK ROCCO,

Plaintiff and Appellant,

v.

XAVIER SERNA,

Defendant and Respondent.

F074846

(Super. Ct. No. BCV-15-101607)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Lorna H. Brumfield, Judge.

Frank Rocco, in pro. per., for Plaintiff and Appellant.

Xavier Becerra, Attorney General, William C. Kwong, Assistant Attorney General, Misha D. Igra and Laraya M. Parnell, Deputy Attorneys General, for Defendant and Respondent.

-ooOoo-

Appellant, Frank Rocco, filed an action against respondent, correctional officer Xavier Serna, for negligence in failing to protect appellant from being attacked by his cellmate. Respondent filed a demurrer to the complaint based on appellant's failure to

* Before Peña, Acting P.J., Smith, J. and DeSantos, J.

timely submit a claim under the Government Claims Act (Gov. Code,¹ § 810 et seq. (the Act)). The court sustained the demurrer and dismissed the complaint without leave to amend.

Appellant challenges the trial court's ruling on appeal. He concedes that he did not timely file a claim under the Act. However, he alleges for the first time on appeal that he was excused from the timely filing of a claim based on his incapacitation resulting from the injuries suffered in the attack. Upon review, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 18, 2015, appellant filed a personal injury complaint against respondent and North Kern State Prison.² Appellant alleged that while he was incarcerated in North Kern State Prison, he warned respondent that he feared for his safety due to threats from his cellmate. On September 2, 2013, appellant's cellmate attacked him while he was sleeping, and appellant suffered permanent vision damage, physical impairment, mental suffering, and memory loss as a result of the attack. Appellant claimed that respondent was negligent in failing to protect him from his cellmate.

Appellant filed a claim with the California Victim Compensation and Government Claims Board (Board) on August 2, 2015, nearly two years after the assault.³ On September 3, 2015, the Board denied the application because the claim was filed more

¹ Unless otherwise noted, further undesignated statutory references are to the Government Code.

² Respondent notes in his brief that North Kern State Prison was not served with the complaint and is not a party to this appeal. Appellant does not challenge that assertion on appeal.

³ We shall provide appellant, a pro se incarcerated litigant, the benefit of the prison-delivery rule, and consider the claim filed when it was delivered to prison authorities on August 2, 2015, although it was not received by the Board until August 13, 2015. (See *Shufelt v. Hall* (2008) 163 Cal.App.4th 1020, 1026.) As explained herein, even with the benefit of the earlier filing date, the claim was not timely filed.

than six months from the date of the incident that was the basis of the claim. The Board further noted that it was too late for it to consider an application for leave to present a late claim.

Respondent demurred to the complaint based on appellant's failure to comply with the mandatory claim presentation requirement, and failure to allege facts excusing his compliance. Appellant filed an opposition to the demurrer, but his opposition did not address his failure to file a timely claim under the Act. The superior court sustained the demurrer without leave to amend because appellant neither complied with the Act nor offered any amendment to the complaint that would cure the defect. On September 26, 2016, the superior court entered judgment, and dismissed the action with prejudice in favor of respondent. On November 28, 2016, appellant filed a notice of appeal.

DISCUSSION

I. Standard of Review

A demurrer is properly sustained when “[t]he pleading does not state facts sufficient to constitute a cause of action.” (Code Civ. Proc., § 430.10, subd. (e).) “The absence of any allegation essential to a cause of action renders it vulnerable to a general demurrer. A ruling on a general demurrer is thus a method of deciding the merits of the cause of action on assumed facts without a trial.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 437, fn. 4.)

“ ‘In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.’ ” (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1050 (*King*); *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.) “If the demurrer was sustained without leave to amend, we consider whether there is a ‘reasonable possibility’ that the defect in the complaint could be cured by amendment.” (*King, supra*, 5 Cal.5th at p. 1050.) The burden is on the plaintiff to prove that amendment could cure the defect. (*Ibid.*)

“ ‘[I]t is not the ordinary function of a demurrer to test the truth of the plaintiff’s allegations or the accuracy with which he describes the defendant’s conduct. A demurrer tests only the legal sufficiency of the pleading. [Citation.] It “admits the truth of all material factual allegations in the complaint ...; the question of plaintiff’s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.” ’ ’ ” (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47.) We similarly accept as true the contents of exhibits attached to the complaint. (See, e.g., *Barnett v. Fireman’s Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505; *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94 [“[E]videntiary facts found in recitals of exhibits attached to a complaint or superseded complaint ... can be considered on demurrer.”].)

On appeal, a resulting judgment of dismissal is reviewed independently. (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512.)

“ ‘ ‘ ‘[W]e accept as true all the material allegations of the complaint’ ’ ’ [citation], but do not ‘assume the truth of contentions, deductions or conclusions of law’ [citation].” (*Ibid.*)

II. Government Claims Act

A. Governing Law

Before suing a public entity, the plaintiff must present a timely written claim for damages to the entity. (§ 911.2; *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208-209 (*Shirk*); *State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1239 (*Bodde*).) Similarly, a claim against a public employee for injuries resulting from acts or omissions in the course of his or her employment must also be presented to the entity. (§ 950.2; *People ex rel. Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 939.)

“Timely claim presentation is not merely a procedural requirement, but is, [] ‘ ‘ ‘a condition precedent to plaintiff’s maintaining an action against defendant.’ ’ ’ ” (*Shirk, supra*, 42 Cal.4th at p. 209; *Bodde, supra*, 32 Cal.4th at p. 1240.) Accordingly, it is an element of the plaintiff’s cause of action and complaints that do not allege facts

demonstrating either that a claim was timely presented or that compliance with the Act is otherwise excused are subject to a general demurrer. (*Bodde*, at pp. 1240, 1245.)

“Under section 911.2, ‘[a] claim relating to a cause of action for death or for injury to person or to personal property ... shall be presented ... not later than six months after the accrual of the cause of action.’ ” (*Bodde, supra*, 32 Cal.4th at p. 1239.) The date of accrual of a cause of action marks the starting point for calculating the claims presentation period. (§ 901; *K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1239.) The general rule is that a cause of action accrues when it is “complete with all of its elements.” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.)

Should the claim not be presented within the applicable time period, litigants can petition for leave to present a late claim within the one-year period from the accrual of the cause of action. (§ 911.4, subds. (a), (b); *Bodde, supra*, 32 Cal.4th at p. 1245.) The reason for the one-year statutory requirement is to “protect[] a governmental entity from having to respond to a claim many years after the accrual of the action.” (*Hernandez v. County of Los Angeles* (1986) 42 Cal.3d 1020, 1030.) However, one exception to the one-year deadline for filing a petition to present a late claim is if during the period the litigant is incapacitated and does not have a guardian or conservator. (§ 911.4, subd. (c); *Roberts v. County of Los Angeles* (2009) 175 Cal.App.4th 474, 479.)

Finally, “[i]f a claim is denied, section 946.6 provides that the party may petition the court for an order relieving the party from the claim-filing requirement. Pursuant to section 946.6, subdivision (c), the court *must* grant the petition if it finds that the application (1) was made within a reasonable time not to exceed that specified in section 911.4, subdivision (b), in other words, one year after the accrual of the cause of action; (2) was denied or deemed denied; and (3) was late for one of the reasons specified in section 911.6, subdivision (b).” (*County of Los Angeles v. Superior Court* (2001) 91 Cal.App.4th 1303, 1313.)

B. Analysis

We find there are several reasons why the trial court did not abuse its discretion in sustaining the demurrer based on appellant's failure to file a timely claim under the Act. The parties do not dispute that the action accrued on the day that appellant was assaulted. Nor is there any dispute that almost two years passed from the time of the incident on September 2, 2013, and the filing of appellant's claim on August 2, 2015.

First, as appellant did not file a claim within six-months, he was required to file a petition for leave to present a late claim; however, he never did. Rather, he filed the standard Government Code claim form nearly two years after the accrual of the cause of action. As he did not file a petition to present a late claim, he did not provide the Board the opportunity to determine whether it should allow him to proceed with a late claim.

Second, the one-year time period for filing a petition to present a late claim expired before he filed a claim. In response to his late filed claim, the Board responded explaining that it had no jurisdiction to consider his claim because it "was presented more than six months from the date of the incident that is the basis of the claim, and it is too late for the Board to consider an application for leave to present a late claim." Courts hold the one-year claim deadline is jurisdictional. Failure to meet the deadline divests courts of their power to adjudicate a victim's claims. (*J.J. v. County of San Diego* (2014) 223 Cal.App.4th 1214, 1221; *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1779 ["Filing a late-claim application within one year after the accrual of a cause of action is a jurisdictional prerequisite to a claim-relief petition. [Citation.] When the underlying application to file a late claim is filed more than one year after the accrual of the cause of action, the court is without jurisdiction to grant relief under Government Code section 946.6."].) Based on appellant's failure to file a petition for leave to present a late claim within one year of the accrual of the action, the trial court lacked jurisdiction to review his claim.

Finally, appellant did not present any argument in his claim or in the underlying action why he was excused from the timely filing of his Government Code Act claim. When respondent filed a demurrer to the action alleging that appellant failed to comply with the claims filing requirement, appellant responded by explaining that his complaint met all the elements required to state a cause of action for negligence. He presented no rationale in opposition why he should be excused from the timely filing of his claim under the Act. Rather, for the first time on appeal, appellant alleges that he was excused from timely filing his claim under the Act based on his incapacity during the claim filing period.

It is true “[a] party may raise a new issue on appeal if that issue is purely a question of law on undisputed facts.” (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1141.) Here, however, appellant has made no effort to show that his incapacitation argument falls within the scope of that exception. (See *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251.) Appellant failed to present factual evidence to support his argument that he was incapacitated to the trial court. As factual questions exist, it is not a pure question of law based on undisputed facts and therefore is not appropriate for review in the first instance on appeal.

Finally, even if we were to review appellant’s arguments on the merits, based on the allegations presented in his appeal, he has not provided credible evidence that he was incapacitated to the extent required to waive the time requirements for filing a late claim. “[T]he type of disability which justifies relief from the [Act] on the grounds of incapacity is an all-encompassing disability which prevents the claimant from even authorizing another to file a claim for the claimant.” (*Barragan v. County of Los Angeles* (2010) 184 Cal.App.4th 1373, 1384.) Appellant asserts that significant injuries suffered during the assault severely affected his ability to focus or concentrate on the procedural guidelines required by the Act. Even assuming as true his assertions that his ability to

focus was impaired, appellant has not established that he was “fully incapacitated.”
(*Barragan v. County of Los Angeles, supra*, at p. 1380.)

Having independently reviewed the trial court’s reasoning for sustaining the demurrer, we find appellant’s contentions that the court erred are without merit and there is no reasonable possibility the complaint could be cured by amendment. (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc., supra*, 2 Cal.5th at p. 512; *King, supra*, 5 Cal.5th at p. 1050.)

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)